

PD-0790-17

IN THE
COURT OF CRIMINAL APPEALS

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COURT OF CRIMINAL APPEALS
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KEITHRICK THOMAS,
Appellant,

VS.

THE STATE OF TEXAS,
Appellee.

ON APPEAL FROM THE 230TH CRIMINAL DISTRICT COURT
OF HARRIS COUNTY, TEXAS

AND ON DISCRETIONARY REVIEW
FROM THE FOURTEENTH JUDICIAL DISTRICT AT HOUSTON

APPELLANT'S REPLY BRIEF

BRIAN W. WICE

NICOLETTE WESTBROOKS

The Lyric Centre
440 Louisiana Suite 900
Houston, Texas 77002-1635
(713) 524-9922 PHONE
(713) 236-7768 FAX
TBA NO. 21417800
wicelaw@att.net

3200 Southwest Freeway
Suite 3300
Houston, Texas 77027
(832) 251-0176 PHONE
(832) 251-1346 FAX
TBA NO. 24010474
egljustus@aol.com

COUNSEL FOR APPELLANT
ORAL ARGUMENT GRANTED

IDENTIFICATION OF THE PARTIES

Pursuant to TEX.R.APP.P. 38.1(a), a list of the names and addresses of all interested parties is provided below so the members of this Honorable Court may determine whether they are disqualified to serve or should recuse themselves from participating in the decision of this case.

Complainant:

State of Texas

Appellant-Criminal Defendant:

Keithrick Thomas

Trial counsel for Appellant:

Letitia Quinones

2120 Welch

Houston, Texas 77019

Counsel on Appeal for the Appellant:

Nicolette Westbrook

3200 Southwest Freeway Suite 3300

Houston, Texas 77027

Counsel for the State:

Neil Krugh & Clint Morgan

Harris County Attorney's Office

1307 San Jacinto

Houston, Texas 77002

Trial Judge:

Honorable Brad Hart

Presiding Judge

230th Criminal District Court

Harris County, Texas

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STATEMENT OF THE CASE

While Appellant does not take issue with the State's recitation of the Statement of the Case, he challenges all factual assertions in the State's brief. This reply brief is timely if filed by March 8, 2018. *See* Tex. R. App. P. 38.6(c).

QUESTION PRESENTED FOR REVIEW

Has a Fourth Amendment violation occurred, where a police officer approaches a vehicle passenger, after the passenger has exited the vehicle, and conducts a warrantless search of the passenger's pockets, in the driveway of the passenger's house?

APPELLANT'S REPLY TO STATE'S RESPONSE

A. The Purpose of this Reply Brief

Tex. R. App. P. 38.3 provides that, "The appellant may file a reply brief addressing *any matter* in the appellee's brief." (emphasis added). In a tone coming perilously close to condescension, the State's merits brief:

- contends that "the deciding circumstances are omitted in the appellant's phrasing of the issue [for review]." ¹ State's Brief at 2.
- asserts Appellant's merits brief fails to "meaningfully challenge the

¹ With all due respect, this assertion is risible. First, Appellant's "phrasing of the issue" was clear, complete and compelling enough to convince at least four judges to grant discretionary review. *See* Tex. R. App. P. 67.1. Second, the Rules of Appellate Procedure do not imbue the State with the authority to second-guess, let alone, critique an appellant's phrasing of an issue presented for review, especially after this Court has granted review.

court of appeals' opinion." *Id.* at 4.

- devotes five pages to parsing Appellant's merits brief with the ardor of a law school proctor without any meaningful attempt at analysis. *Id.* at 10-14.
- alleges the "most notable thing about the appellant's brief is how little it engages the [court of appeals'] opinion." *Id.* at 14.
- claims the "only [appellate court] holding that the appellant attacks with any substance is the holding [Officer] Gemmill was justified in seizing the first pill bottle under the plain-view doctrine." *Id.* at 15-16.
- avers "appellant seems to ascribe no legal significance to the [traffic] stop." *Id.* at 19.

In doffing its cap as an advocate and donning the mantle of *ad hoc* legal writing and research professor, the State has opened the door to the inclusion of matters not ordinarily appearing in a reply brief. This reply brief does no more than address the leitmotif of the State's response.

B. The Underlying Legal Narrative: What is this Case All About?

Contrary to Appellant's claims in the trial court, court of appeals, his petition for discretionary review or merits brief before this Court, this case *does not* turn on the legitimacy of his traffic stop,² or an overly intrusive

² Because Appellant has now conceded the validity of the traffic stop, the legal significance of the State's discourse on the traffic stop as "The Elephant in the Room," State's Brief at 19-22, to this Court's resolution of the whether the plain view doctrine legitimates Officer Gemmill's seizure of the first pill bottle from Appellant's pants pocket, is, accordingly, of no moment.

or temporary detention: Appellant now concedes that the court of appeals correctly rejected each of these claims. *See Thomas v. State*, 2017 WL 2484366 at **2-6 (Tex.App.— Houston [14th Dist.] June 8, 2017, pet. grt'd)(op. not designated for publication). What this case *does* turn on is whether the court of appeals correctly concluded that the State shouldered its burden of showing that the warrantless seizure of the pill bottle from Appellant's pants pocket that contained Xanax and led to the discovery of the cocaine forming the basis for his conviction was permissible under the plain view doctrine.³ *Id.* at **6-8. Because the court of appeals' reasoning is clearly in conflict with decisions from this Court and the Supreme Court explicating the Fourth Amendment's plain view exception to the warrant requirement, this Court is compelled to reverse the court of appeals.

C. The Court of Appeals' Decision

In framing Appellant's complaint, the court of appeals wrote:

Appellant contends that Officer Gemmill illegally searched him and “discovered the pill bottle” immediately after she detained him. Appellant contends that the seizure of the first pill bottle containing Xanax was not justified because the “incriminating character of the pill bottle was not immediately

³ Because the issue on which this Court granted discretionary review is clearly subsumed by the court of appeals' decision on the issue of plain view, Appellant's concessions do not affect this Court's grant of review.

apparent to Officer Gemmill” as required by the plain view doctrine.

*6. The court of appeals rejected Appellant’s complaint, concluding that, “No Fourth Amendment violation occurred because Officer Gemmill did not search appellant and was justified in seizing the Xanax pill bottle pursuant to the plain view doctrine based on the following factors:

- Appellant’s short stay at a “known narcotics house that in the past was known to distribute narcotics” where officers had “executed a narcotics search warrant” and “arrested individuals for narcotics.”
- Appellant’s furtive gestures toward his waistband.
- “Based on her experience, Officer Gemmill knew that individuals often ‘carry their narcotics within pill bottles’ and without a label or name on it.”
- Officer Gemmill “*removed the pill bottle she saw ‘sticking out’ of Appellant’s pocket*⁴ and immediately saw it did not have appellant’s name on it ‘and had Xanax tablets inside of it.’” (emphasis added).
- “Although it was not immediately apparent that the pill bottle contained Xanax pills that were not prescribed to Appellant, Officer Gammill did have probable cause to associate the pill bottle with contraband and criminal activity.”

**7-8. Relying on a trio of court of appeals’ decisions – two unpublished

⁴ This assertion is at odds with the trial court’s fact finding that, “While placing [Appellant] into [sic] handcuffs, Officer Gemmill observed *the top of a prescription bottle* in [his] left pants pocket.” (emphasis added). The State echoes this misstatement, contending the trial court found “the first pill bottle ... in plain view,” State’s Brief at 5, and that Gemmill “saw a pill bottle sticking out of [Appellant’s] pocket.” *Id.* at 18. The trial court’s findings are attached as an appendix.

opinions and one where discretionary review was not sought – the court of appeals concluded that Officer Gemmill “presented sufficient facts and circumstances demonstrating her belief that the pill bottle she saw in plain view was of ‘incriminating character.’” *8.

Notably absent in the court of appeals’ opinion was any mention of Appellant’s contention that Gemmill’s seizure of the first pill bottle could not be justified under the plain view doctrine because it occurred in the driveway of Appellant’s residence – the curtilage protected by the Fourth Amendment. Brief at 25-28, 45, 48. In seven pages of argument it devoted to responding to Appellant’s claims, the State did not address this discrete claim. State’s Brief at 4-9. Notably, the court of appeals not only failed to address this complaint, it erroneously noted that Appellant “challenges only the second prong” of the tripartite plain view doctrine. *7. Although Appellant did not argue that the court of appeals violated its ministerial duty to “address[] every issue raised and necessary to final disposition of the appeal,” *see* Tex. R. App. P. 47.1, or its distortion of his argument warranted review pursuant to Tex. R. App. P. 66.3(f), this Court granted

Appellant's petition for discretionary review on November 22, 2018.⁵

D. The Standard of Review

Appellate review of the denial of a motion to suppress is limited to whether the trial court abused its discretion. *State v. Dixon*, 206 S.W.3d 587, 590 (Tex.Crim.App. 2006). If fairly supported by the record, the trial court's ruling on a motion to suppress will not be disturbed on appeal if it is correct on any theory of law applicable to the case. *Weems v. State*, 493 S.W.3d 574, 577 (Tex.Crim.App. 2016). At a suppression hearing, the trial court is the sole finder of fact and is free to believe or disbelieve any or all of the evidence adduced. *Id.* When, as here, the trial court makes written findings of fact, an appellate court affords them almost total deference as long as the record supports them. *State v. Castleberry*, 332 S.W.3d 460, 465 (Tex.Crim.App. 2011). The trial court's application of the law to the facts is not entitled to any deference on appeal and is reviewed *de novo*.

⁵ Appellant renewed his curtilage-based claim in his petition for review, Petition at 2, 6-7, 10, and in his merits brief. Brief at 24-25, 40. *See* RR 45-46 (Gemmill's acknowledgment that she handcuffed Appellant and seized the first pill bottle "in his own driveway" on "private property."). While recognizing that Appellant "spends a considerable part of his brief discussing curtilage," the State chides him for failing to cite "any case holding that officers may not walk up to an unenclosed driveway." State's Merits Brief at 21. On January 9, 2018, the Supreme Court heard oral arguments in *Collins v. Virginia*, No. 16-1027, to resolve the curtilage-based issue of whether police violated the Fourth Amendment by "walking up to an unenclosed driveway" of a residence and conducting a warrantless search of a vehicle in the driveway.

Torres v. State, 182 S.W.3d 899, 902 (Tex.Crim.App. 2005).

While the abuse of discretion standard driving appellate review of the trial court's ruling is deferential, this standard does not insulate the trial court's decision from reversal. *Montgomery v. State*, 810 S.W.2d 372, 392 (Tex.Crim.App. 1991)(op. on reh'r'g). "Abuse of discretion does not imply intentional wrong or bad faith, or misconduct, but means only an erroneous conclusion." *Hebert v. State*, 836 S.W.2d 252, 255 (Tex.App.–Houston [1st Dist.] 1992, pet. ref'd). The trial court lacks the discretion to determine what the law is, or in applying the law to the facts, and has no discretion to misinterpret the law. *Walker v. Packer*, 827 S.W.2d 833, 840 (Tex. 1992); *see also Wilton v. Seven Falls Co.*, 515 U.S. 277, 289 (1995)(rejecting argument that "[appellate] review for abuse of discretion 'is tantamount to no review' at all").

E. The Plain View Exception to the Fourth Amendment

The Fourth Amendment to the Constitution of the United States guarantees that "[t]he right of the people to be secure in their persons ... against unreasonable ... seizures, shall not be violated." The Exclusionary Rule construct of this provision is made applicable to the states through the due process clause of the Fourteenth Amendment. *Mapp v. Ohio*, 367

U.S. 643, 655 (1961). While a warrantless search is *per se* unreasonable unless the State can shoulder its burden of showing that it falls within a “few specifically defined and well delineated exceptions,” *Minnesota v. Dickerson*, 508 U.S. 366, 372 (1993), seizing contraband in plain view does not run afoul of the Fourth Amendment. *Coolidge v. New Hampshire*, 403 U.S. 443, 465 (1971)(plurality op.). The “plain view” doctrine is not really an “exception” to the warrant requirement because the seizure of property in plain view involves no invasion of privacy and is presumptively reasonable. *Walter v. State*, 28 S.W.3d 538, 541 (Tex.Crim.App. 2000), citing *Texas v. Brown*, 460 U.S. 730, 738-39 (1983); see also *New York v. Class*, 475 U.S. 106, 112 (1971)(“The State’s intrusion into a particular area cannot result in a Fourth Amendment violation unless the area is one in which there is a constitutionally protected reasonable expectation of privacy.”). But the Supreme Court has made it clear that “the ‘plain view’ doctrine may not be used to extend a general exploratory search from one object to another until something incriminating at last emerges.” *Coolidge v. New Hampshire*, 403 U.S. at 466.

The seizure of an object is lawful under the plain view doctrine if three requirements are met. First, police officers must lawfully be where

the object can be “plainly viewed.” Second, “the incriminating character” of the object in plain view must be “immediately apparent” to the police officers. Third, police must have the right to access the object.⁶ *Keehn v. State*, 279 S.W.3d 330, 334 (Tex.Crim.App. 2009). The immediacy prong here required a showing that Gemmill had probable cause to believe that the top of the pill bottle she saw in Appellant’s pants pocket was incriminatory in nature or constituted contraband. *State v. Dobbs*, 323 S.W.3d 184, 187 (Tex.Crim.App. 2010); *see also Arizona v. Hicks*, 480 U.S. 321, 327 (1987)(“[T]he fact that an item comes lawfully within an officer’s plain view cannot, alone, supplant the requirement of probable cause.”).

Whether Gemmill believed that she had probable cause is irrelevant to whether she actually had probable cause. It is well settled that courts are to decide issues of probable cause on an objective basis, without regard to Gemmill’s subjective beliefs, whatever those beliefs may be. *See e.g., Whren v. United States*, 517 U.S. 806, 813 (1996)(“Subjective intentions play no role in ordinary, probable-cause, Fourth Amendment analysis.”); *Horton v. California*, 496 U.S. 128, 138 (1990)(“[E]venhanded law

⁶ *See* p. 5-6, *supra*. Contrary to the court of appeals’ distortion of his Appellant’s claim, this discrete issue is part and parcel of the issue presented for review in this matter.

enforcement is best achieved by the application of objective standards of conduct, rather than standards that depend upon the subjective state of mind of the officer.”). Moreover, an unarticulated hunch, suspicion, or the good faith of an officer is insufficient to justify a warrantless seizure. *See Torres v. State*, 182 S.W.3d at 902.

The court of appeals admitted that “it was not immediately apparent that the pill bottle contained Xanax pills that were not prescribed to appellant.” *7. Whether Gemmill’s conduct in removing the pill bottle from Appellant’s pants pocket to confirm her belief that the bottle was inherently contraband was a constitutionally-protected search animates this Court’s resolution of this issue. As set out below, the cases the court of appeals relied upon do not support the great weight rested on them, and the authority it failed to acknowledge ultimately derails its holding.

*F. Marcopoulos v. State:
Drug House Visit + Furtive Gestures = Insufficient Probable Cause*

While Gemmill’s subjective beliefs play no part in the resolution of whether probable cause existed for her seizure of the first pill bottle, it is not insignificant she opined that she “found probable cause whenever [she]

was told the vehicle was leaving the known narcotics location...”⁷ But this Court’s recent decision in *Marcopoulos v. State*, ___ S.W.3d ___, PD-0931-16, 2017 WL 6505870 (Tex.Crim.App. December 20, 2017), buttresses the conclusion that Gemmill was clearly wrong.

In *Marcopoulos*, the defendant walked into Diddy’s, a Houston bar known for criminal activity, stayed for three to five minutes, and then left. A police officer subsequently pulled up behind the defendant’s vehicle and saw him make furtive gestures around the center console. When the defendant committed a traffic violation, the officer stopped him, searched his vehicle, and found cocaine.⁸ Although the court of appeals concluded that the search was justified based on the court of appeals’ reliance on the automobile exception to the Fourth Amendment, this Court disagreed, and reversed. *Id.* at *6.

While police “knew Diddy’s to be a hotbed of narcotics activity,” the probative value of the defendant’s “unusually brief appearance within the bar” was “severely limit[ed]” because “this activity was never even

⁷ RR at 34 (Gemmill’s suppression hearing testimony). An excerpt of her testimony from the suppression hearing is attached as an appendix.

⁸ See *id.* at *3 (“The fact that Marcopolous was searched in connection with, rather than outright arrested for, a drug offense does not lessen the requirements of probable cause.”).

remotely linked to [him].” *Id.* at **3-4. Neither did police “witness [him] initiate a transaction; engage anyone in the pursuit of drugs; or possess any containers, cash, or other paraphernalia which would suggest that he intended to buy or had recently bought contraband.” *Id.* at *3. Indeed, unlike *Marcopolous*, where this Court assumed that the defendant had been at Diddy’s “multiple times,” *id.*, the trial court made no such finding in the instant case.⁹

This Court went on to hold that the “discernible gap between the reasonable suspicion aroused by Marcopoulos’s brief presence at Diddy’s and the proof necessary to establish probable cause ... was not bridged by [his] furtive gestures.” *Id.* at *4. Reaffirming the fundamental principle that “furtive gestures must be coupled with ‘reliable information or other suspicious circumstances relating the suspect to the evidence of crime’ to establish probable cause,” *id.*, this Court concluded:

Under these circumstances, Officer Oliver’s notions about Marcopoulos, though certainly providing reasonable suspicion justifying a temporary investigative detention, did not rise to the level of probable cause justifying a full-blown search. Although Oliver’s suspicion was ultimately vindicated, “a

⁹ See *id.* (“But even assuming Marcopoulos had been seen at Diddy’s ‘multiple times,’ this hardly leads to the conclusion that, as suggested by the State, [police] knew Marcopoulos to be a repeat narcotics customer.”)(footnote omitted).

search cannot be justified by what it uncovers.”

Id. at **4-5 (footnotes omitted).

The rationale in *Marcopoulos* applies with equal force in the instant case. Indeed, Gemmill admitted that, prior to her handcuffing Appellant and her warrantless seizure of the first pill bottle, she had no probable cause to believe that he had committed any crimes. (RR 43). Shorn of Appellant’s brief stay at a known drug house and his furtive gestures, the mere fact that Gemmill saw a nondescript pill bottle protruding from his pants pocket did not provide probable cause for her constitutionally-protected intrusion.¹⁰ And, while the court of appeals pointed to Gemmill’s testimony that individuals often “carry their narcotics within pill bottles,” *7, as fortifying her belief the top of a pill bottle was inherently suspect, as recounted below, there is “less in [this factor] than meets the eye.” *Ripkowski v. State*, 61 S.W.3d 378, 394 (Tex.Crim.App. 2001)(Cochran. J., concurring).

G. Gemmill Had Insufficient Probable Cause to Associate the First Pill Bottle With Contraband and Criminal Activity

¹⁰ In spite of its parsing and criticism of Appellant’s merits brief, the State makes no effort at discussing, let alone, distinguishing *Marcopoulos*, other than that it “seems to support the proposition stated in [Appellant’s] section heading.” State’s Brief at 11.

First, the trial court's written fact findings describing what Gemmill observed and retrieved from Appellant's pants pocket as a "prescription bottle,"¹¹ are unsupported by the record and not entitled to deference. *See e.g., State v. Castleberry*, 332 S.W.3d at 465. In reality, the suppression hearing reveals no mention of this object as anything but a "pill bottle." The distinction between the two is by no means insignificant. A pill bottle encompasses a bottle of One-a-Day Vitamins or any other over-the-counter medication that, because it is not illegal to possess, would not itself "warrant a person of reasonable prudence in the belief that contraband or evidence of a crime will be found [within it]." *Wiede v. State*, 214 S.W.3d 17, 24 (Tex.Crim.App. 2007). By contrast, a *prescription* pill bottle carries a substance that may be legally possessed only by someone with a lawful prescription. While the latter can provide probable cause to associate it with contraband and criminal activity, the former does not, and so cannot reasonably be associated with contraband or criminal activity.¹²

¹¹ See Fact Findings Nos. 12-14.

¹² When Gemmill was asked what she thought when she saw the top of the first pill bottle, she replied, "Based on previous cases that I've made on other on – on other defendants, oftentimes people, *I guess*, carry their narcotics within pill bottles." (RR 28)(emphasis added). This unusual choice of words comes perilously close to suggesting that her association of the mere top of the pill bottle with contraband or criminal activity was nothing more than a hunch or suspicion insufficient

That Gemmill did not have probable cause to associate the mere top of the first pill bottle with contraband or criminal activity is fortified by authority dating back some four decades. In *Thomas v. State*, 572 S.W.2d 507, 509 (Tex.Crim.App. 1976), this Court held that an officer's seizure of pills in a pill bottle could not be upheld under the plain view doctrine because, "Prescription drugs are not inherently contraband, stolen goods, or objects dangerous in themselves." Over the next several years, this Court relied on *Thomas* in a series of cases to reject the State's claim that drug seizures were permissible under the plain view doctrine. *See e.g.*, *Howard v. State*, 599 S.W.2d 597, 602 (Tex.Crim.App. 1979); *Sullivan v. State*, 626 S.W.2d 58, 60 (Tex.Crim.App. 1981); *see also Miller v. State*, 653 S.W.2d 510, 513 (Tex.App.— Corpus Christi 1983, pet. ref'd.). Unless this Court has overruled *sub silentio Thomas et al*, these cases deal a fatal blow to the court of appeals' decision.¹³

The reasoning in *Thomas et al* echoes in the decisions of several of

to warrant a finding of probable cause. *Torres v. State*, 182 S.W.3d at 902.

¹³ Admittedly, the legitimacy of *Thomas* and its progeny were called into question by *Texas v. Brown*, 460 U.S. at 741-42, clarifying the "immediately apparent" prong, in holding that the plain view doctrine did not "demand any showing that such a belief be correct or more likely true than false." Whether, and to what extent, the vitality of *Thomas* was undermined by *Brown* is, of course, an important question this Court will have to resolve in this case.

the federal courts of appeals.¹⁴ In *United States v. Villarreal*, 963 F.3d 770, 776 (5th Cir. 1992), the court held that the plain view exception is not intended to justify “warrantless, exploratory searches of containers that purport to contain innocuous materials.” In *United States v. Sylvester*, 848 F.2d 520, 525 (5th Cir. 1988), the court held that “a container cannot be opened unless its *contents* are in plain view or they can be inferred from the container’s outward appearance.” (emphasis added). The Sixth Circuit has embraced the holding in *Thomas* in finding that the seizure of a prescription pill bottle containing clear liquid could not be justified under the plain view doctrine even though an experienced narcotics agent testified he associated pill bottles with methamphetamine.¹⁵ *United States v. McLevain*, 310 F.3d 434, 442-43 (6th Cir. 2002). In discounting the agent’s assertion, the Sixth Circuit concluded that:

The connection between these items and illegal activities ... is not enough to render these items intrinsically incriminating. *The connection is not enough to make their intrinsic nature such that their mere appearance gives rise to an association with criminal activity.*

¹⁴ While this Court has long held that the decisions of the federal courts of appeals are not binding on it, it has frequently found their holdings to be both instructive and persuasive.

¹⁵ The agent also made this claim about a twist tie, cigarette filter, and spoon. *Id.*

Id. (emphasis added).

The holding in *Thomas*, not to mention those of the Fifth and Sixth Circuits, have also resonated with several other state appellate courts. In *Ferrell v. State*, 649 So.2d 831 (Miss. 1995), an officer sought to justify opening a matchbox that contained drugs under the plain view doctrine. The Mississippi Supreme Court concluded the officer's conduct could not be justified under the plain view doctrine even though he testified that, in his experience, narcotics were often carried in matchboxes:

Given their utility and wide availability, matches are common objects in the everyday world. The mere presence of a matchbox on the front seat of a car ordinarily cannot be termed an incriminating object in plain view.

Id. at 834; *see also Anderson v. State*, 16 So.3d 756, 761 (Miss. Ct. App. 2009)(plain view doctrine did not warrant officer seizing pill bottle from defendant's pants pocket and opening it to uncover narcotics because "a pill bottle, in and of itself, is not contraband."); *Com. v. Hudson*, 92 A.3d 1235, 1242-43 (Pa. Super. 2014)(warrantless search of pill bottles found in vehicle's console could not be sustained under plain view doctrine where officer's mere observation of pill bottles with labels partially removed did not immediately reveal their incriminatory nature).

The holdings in these cases buttress the conclusion that an item as quotidian as a pill bottle, especially one where only the top of it can be seen,¹⁶ simply cannot qualify as being intrinsically incriminatory. If this Court affirms the court of appeals' decision on this record, then almost any object or item, to almost any police officer, depending on the exigencies of an encounter, could fit this chameleon-like description. This cannot be the constitutional *raison d'être* providing for the plain view exception.

H. Arizona v. Hicks: A Search is Still a Search

In *Arizona v. Hicks*, 480 U.S. at 323, police officers who were inside Hicks' apartment to search for someone who had fired a bullet through the floor of his apartment, as well as any other victims or weapons, observed a set of expensive stereo components which appeared to be out of place in "the squalid and ... ill-appointed four-room apartment." Suspecting that the components were stolen, the officers took down the serial numbers of some of the components, moving a turntable in order to record its serial numbers. The trial court granted Hicks' motion to suppress, the Arizona Court of Appeals affirmed, and the Arizona Supreme Court denied review.

¹⁶ See *Williams v. State*, 743 S.W.2d 642, 645 (Tex.Crim.App. 1988)(officer's observation of "about an inch" of a rifle stock sticking out from under towel in cab of truck insufficient basis under plain view doctrine to associate rifle with criminal activity).

Id. at 324. The Supreme Court affirmed, concluding that while the Fourth Amendment was not implicated by the mere recording of serial numbers, the plain view doctrine did not sanction the officers' conduct in moving the turntable – no matter how slightly – to record its serial numbers:

Officer Nelson's moving of the equipment ... did constitute a "search" separate and apart from the search for the shooter, victims, and weapons that was the lawful objective of his entry into the apartment. Merely inspecting those parts of the turntable that came into view during the latter search would not have constituted an independent search, because it would have produced no additional invasion of [Hicks'] privacy interests. *But taking action, unrelated to the objectives of the authorized intrusion, which exposed to view concealed portions of the apartment or its contents, did produce a new invasion of [Hicks'] privacy unjustified by the exigent circumstances that validated the entry. This is why ... the "distinction between 'looking' at a suspicious object in plain view and 'moving' it even a few inches" is much more than trivial for purposes of the Fourth Amendment.* It matters not that the search uncovered nothing of any great personal value to [Hicks] – serial numbers rather than (what might conceivably have been hidden behind or under the equipment) letters or photographs. *A search is a search, even if it happens to disclose nothing but the bottom of a turntable.*

Id. at 324-25 (citation omitted)(emphasis added).

The holding in *Hicks*, a key case neither discussed or distinguished by the court of appeals, buttresses the conclusion that the court of appeals' plain view doctrine analysis was wide of the mark. As the Court made

clear in *Hicks*, the distinction between Gemmill “looking” at the top of the pill bottle in Appellant’s pants pocket and “moving it even a few inches” to determine it did not have a label “is much more than trivial for purposes of the Fourth Amendment.”¹⁷ As in *Hicks*, the removal of the pill bottle was a warrantless search effected without probable cause, even if it happened to disclose nothing but the absence of a label.¹⁸

I. The Cases Relied on by the Court of Appeals are Distinguishable

McGaa v. State, 2014 WL 5176652 (Tex.App.– San Antonio October 15, 2014, pet. ref’d)(op. not designated for publication), and *Barron v. State*, 2001 WL 564266 (Tex. App. – El Paso May 25, 2001, no pet.)(op. not designated for publication), *8, are devoid of any precedential value under TEX.R.APP.P. 47.7(a). And, both are factually distinguishable. Because the defendant in *McGaa* was passed out in the driver’s seat with the engine

¹⁷ The State cites *State v. Dobbs*, 323 S.W.3d 184, 188-89 (Tex.Crim.App. 2010), State’s Brief at 17, where this Court upheld the seizure of golf clubs under the plain view doctrine; *Dobbs* is clearly distinguishable. As this Court noted, the seizure in *Dobbs* was proper under the plain view doctrine because, “The further investigation that the officers undertook ... did not involve any search of the premises that was not already authorized by the search warrant” and so *Dobbs*’ “privacy interests were not compromised.” *Id.* Here, by contrast, and as in *Hicks*, Gemmill was unable to see there was no name on the pill bottle until she engaged in further investigation that constituted a constitutionally-protected intrusion by removing the pill bottle from Appellant’s pants.

¹⁸ While the State discusses *Hicks*, State’s Brief at 16-17, it does not, because it cannot, come to grips with the notion that Gemmill’s conduct in removing the pill bottle from Appellant’s pants pocket was as much of a constitutionally-prohibited search as police moving the turntable in *Hicks*.

running, there was probable cause to believe there was a nexus between the pill bottle between the defendant's legs and her possible intoxication. In *Barron*, the defendant's reckless driving and denial that he was on medication gave the officer probable cause to believe a pill in the console was connected to the defendant's criminality. *Lopez v. State*, 223 S.W.3d 408, 411 (Tex.App.— Amarillo 2006, no pet.), the third case on which the court of appeals relied, provides even less support for its holding. In *Lopez*, the officer's observation of a "tiny bit" of a plastic bag in the crease around the gas cap on the rear driver's side provided was enough to warrant his belief that the only reason for the plastic bag was to conceal narcotics.¹⁹ Accordingly, the court of appeals' reliance on this trio of cases will not support the great weight rested upon them.²⁰

¹⁹ No doubt recognizing that *McGaa* and *Barrone* have no precedential value and that *Lopez* is distinguishable, the State did not rely on these cases in the court of appeals. The court of appeals' reference to *Joseph v. State*, 807 S.W.2d 303, 308 (Tex.Crim.App. 1991), *7, and the State's reliance on it, State's Brief at 18, are quizzical, given this Court's holding in *Joseph* that the plain view doctrine did not warrant the officer opening and reading a greeting card in the defendant's residence.

²⁰ The State's reliance on *Hill v. State*, 303 S.W.3d 863, 874 (Tex.App.— Fort Worth 2009, pet. ref'd), and *Arrick v. State*, 107 S.W.3d 710, 719 (Tex.App.— Austin 2003, pet. ref'd), State's Brief at 18, is equally misplaced. In *Hill*, it was not only immediately apparent to the officers – and to anyone who has ever watched a MIAMI VICE repeat – that the off-white colored rocks in the plastic bag of the front seat was crack cocaine, an intrinsically incriminating object, unlike the top of the pill bottle in this case. And, in *Arrick*, unlike the case at bar, police not only had consent to search the premises where the defendant's shoes were seized, but because police had probable cause to believe that the victim's blood might be found on the defendant's shoes, the value of the shoes as evidence was immediately apparent.

J. When it Comes to the Fourth Amendment, the Tie Goes to Appellant

Perhaps no other protection embodied in the Bill of Rights is more vital than the Fourth Amendment's proscription against unreasonable searches and seizures, the fundamental principle of which "is to safeguard the privacy and security of individuals against arbitrary invasions by government officials." *Camara v. Municipal Court*, 387 U.S. 523, 528 (1967); *see also Skinner v. Railway Executives' Association*, 489 U.S. 602, 613-14 (1989) ("The [Fourth] Amendment guarantees the privacy, dignity, and security of persons against certain arbitrary and invasive acts by officers of the Government or those acting at their direction."). While this may well be a close case, our judicial heritage is rich in the belief, that because the Fourth Amendment exists to protect the privacy, security, and dignity of any citizen who is the victim of an illegal seizure, "Under a long line of our decisions, the tie must go to the defendant." *Cortez v. State*, ___ S.W.3d ___, 2018 WL 525696 at *8 (Tex.Crim.App. January 24, 2018) (Newell, J., *concurring*), *quoting United States v. Santos*, 553 U.S. 507, 514 (2008); *see also Arizona v. Hicks*, 480 U.S. at 329 ("But there is nothing new in the realization that the Constitution sometimes insulates the criminality of a few in order to protect the privacy of us all.").

CONCLUSION AND PRAYER

Appellant prays that the decision of the Fourteenth Court of Appeals be reversed and the cause remanded to the trial court for proceedings not inconsistent with this Court's opinion.

RESPECTFULLY SUBMITTED,

/s/ **BRIAN W. WICE**

BRIAN W. WICE

The Lyric Centre
440 Louisiana Suite 900
Houston, Texas 77002-1635
(713) 524-9922 PHONE
(713) 236-7768 FAX
TBA NO. 21417800

/s/ **Nicolette Westbrook**

NICOLETTE WESTBROOKS

3200 Southwest Freeway
Suite 3300
Houston, Texas 77027
(832) 251-0176 PHONE
(832) 251-1346 FAX
TBA NO. 24010474

COUNSEL FOR APPELLANT
KEITHRICK THOMAS

CERTIFICATE OF SERVICE

Pursuant to Tex. R. App. 9.5(d), I certify that a copy of this reply brief was served upon opposing counsel by e-filing on March 7, 2018.

/s/ BRIAN W. WICE

BRIAN W. WICE

CERTIFICATE OF COMPLIANCE

Pursuant to Tex. R. App. 9.4(1)(i)(1), I certify that this document complies with the type-volume limitations of Tex. R. App. P. 9.4(i)(2)(D) and exclusive of the exempted portions set out in Tex. R. App. P. 9.4(i)(1), this document contains 5,384 words.

/s/ BRIAN W. WICE

BRIAN W. WICE

APPENDIX A

TRIAL COURT'S FINDINGS OF FACT AND CONCLUSIONS OF LAW

THE STATE OF TEXAS § IN THE 230th DISTRICT COURT
 VS. § OF
 KEITHRICK THOMAS § HARRIS COUNTY, TEXAS

FINDINGS OF FACT AND CONCLUSIONS OF LAW

On February 23rd, 2015 Keithrick Thomas filed a dispositive motion to suppress which was denied and subsequently, the he was sentenced to 2 years in the Texas Department of Corrections. Keithrick Thomas was represented by Letitia Quinones and Assistant District Attorney Neil Krugh prosecuted for the State of Texas.

The Court, having observed the demeanor of the witnesses and the manner in which each testified, judging their credibility, and after hearing the arguments of counsel, hereby makes the following Findings of Fact and Conclusions of Law:

FINDINGS OF FACT

1. The Defendant, Keithrick Thomas, was charged by indictment in the above styled and numbered cause with the felony offense of Possession of a Controlled Substance.
2. Officer Rohan Walker and Officer Elizabeth Gemmill are credible and reliable witnesses who testified truthfully at the motion to suppress.
3. On January 15, 2015, the Defendant, later identified as Keithrick Thomas, was seen by Officer Walker, who was working surveillance in plain clothes, exit the passenger side of a vehicle and enter a residence known for the sale of narcotics located at 4306 Trafalgar, Houston, Harris County, TX.
4. Office Gemmill executed a narcotics search warrant at 4306 Trafalgar, prior to January 15, 2015.
5. Office Gemmill previously arrested other individuals who have gone into and come from 4306 Trafalgar, Houston, Harris County, TX for possession of a controlled substance.
6. Officer Walker saw the Defendant exit the residence after a short time and enter back into the passenger side of the vehicle.

FILED

Chris Daniel
District Clerk

MAY 18 2016

Time: _____
Harris County, Texas
By _____
Deputy

7. Officer Walker's partner relayed this information to Gemmill who was in a marked patrol unit.
8. Officer Gemmill's vehicle caught up to the vehicle which failed to signal a turn.
9. The vehicle came to a stop in front of 4322 Grapevine, Houston, Harris County, TX, which is the Defendant's address.
10. The Defendant began walking up the driveway and was seen by Officer Gemmill making furtive movements towards his midsection where he had a pocket on each side of his hoodie.
11. Officer Gemmill placed the Defendant into handcuffs for her safety based on the Defendant's furtive movements.
12. While placing the Defendant into handcuffs, Officer Gemmill observed the top of a prescription bottle in the Defendant's left pants pocket.
13. Officer Gemmill retrieved the prescription bottle and noticed that it did not have a label on the outside.
14. Officer Gemmill found that the prescription bottle had Xanax in it and the Defendant did not have a prescription for Xanax.
15. Officer Gemmill then searched the Defendant for more narcotics and found another pill bottle in the Defendant's front right pants pocket.
16. The second pill bottle found in the Defendant's front right pants pocket had a label on it that did not belong to the Defendant.
17. The second pill bottle found in the Defendant's front right pants pocket had a razor blade and crack cocaine inside of it which field tested positive for cocaine in the amount of 3.81 grams.

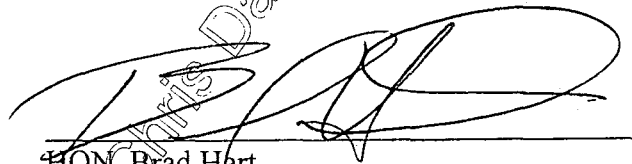
CONCLUSIONS OF LAW

1. The officers' testimony established specific, articulable facts and reasonable inferences substantial enough to support reasonable suspicion that the Defendant had been engaged in criminal activity. *Ford v. State*, 158 S.W.3d 488, 492 – 493 (Tex. Crim. App. 2005)
2. The investigative detention of the Defendant was lawful in order to ensure officer safety, maintain the status quo, and ensure the continued presence of the

- Defendant during the course of a brief investigation. *State v. Sheppard*, 271 S.W.3d 281, 291 (Tex. Crim. App. 2008)
3. Officer Gemmill had probable cause to search the Defendant after she observed in plain view the top of the pill bottle, which based on her training and experience contained contraband, inside of the Defendant's left pants pocket. *State v. Dobbs*, 323 S.W.3d 184, 189 (Tex. Crim. App. 2010)
 4. A person's conduct when viewed in the light of the totality of the circumstances give rise to reasonable suspicion. *Woods v. State*, 956 S.W.2d 33, 37 (Tex. Crim. App. 1997)

MAY 18 2016

SIGNED AND ENTERED this ____ day of ____, 2016.



HON. Brad Hart
230th District Court
Harris County, Texas

Unofficial Copy Office of the District Clerk

CAUSE NO. 1454620

THE STATE OF TEXAS

§

IN THE 230th DISTRICT COURT

VS.

§

OF

KEITHRICK THOMAS

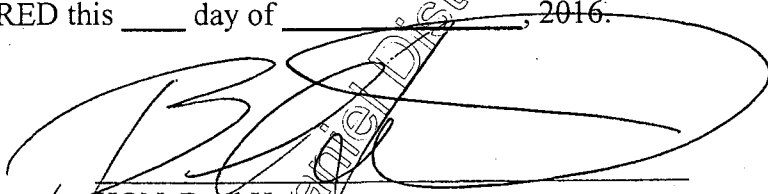
§

HARRIS COUNTY, TEXAS

ORDER

The Clerk of the Court is hereby ORDERED to file the foregoing Findings of Fact and Conclusions of Law with the appellate record in this cause.

SIGNED AND ENTERED this ____ day of ____, 2016.

A large, stylized handwritten signature in black ink, appearing to read 'Brad Hart', is written over the signature line and extends upwards into the text area.

HON. Brad Hart
230th District Court
Harris County, Texas

Unofficial Copy Office of Christy B. Bledsoe, District Clerk

1 violation that those police officers made on that day,
2 I'm asking you to suppress the evidence. Because a
3 person should be able to stand in their driveway, not
4 commit any crimes, and no matter who they were driving
5 with, they don't deserve to be handcuffed and searched.
6 We have rights. And I'm asking that those rights be
7 upheld today, Your Honor.

8 THE COURT: All right. Thank you, ma'am.
9 Mr. Krugh?

10 MR. KRUGH: Thank you, Your Honor.

11 For the ease of the Court I'll take each
12 of defense counsel's arguments as she presented them.

13 As far as the address, 4306 Trafalgar,
14 you heard testimony from Officer Walker as well as
15 Officer Gemmill that they aware of a search warrant
16 being executed at that residence before for known
17 narcotics activity. Even the defense witness that
18 lives there, Mr. Johnson, stated that he remembers at
19 some point in time last year or whenever, that a search
20 warrant was executed. So, that goes to the credibility
21 of the officers in that they knew that this was a known
22 narcotics house for narcotic activity.

23 With that, you have to take the
24 credibility of the witnesses that took the stand on the
25 State's behalf. Clearly in Officer Walker, 16 years

1 with HPD and Officer Gemmill with five years compared
2 with the witnesses that the defendant brought. Of
3 course, they're going to testify to the fact that what
4 the officer saw was not the case, even the defendant
5 himself.

6 The officers testified it was Mr. --
7 Officer Walker that testified that he saw the defendant
8 pull up as a passenger. Get out. Go into the house
9 briefly. Come back into the front passenger seat. And
10 then leave. At that point, that's when he alerts
11 Officer Gemmill that -- what happened, that the
12 defendant did, in fact, do what -- he did, in fact, go
13 in that house. Come and get in the car and then leave.

14 At that point that's when Officer
15 Gemmill, who was a block away -- she even testified to
16 the fact that they -- they went really fast to try to
17 catch up with him. So, that goes to the their
18 credibility as well with Officer Gemmill, that yeah,
19 they were a block away. But they sped quickly so they
20 could catch up and see if he's coming to commit -- see
21 if the driver of the vehicle is going to commit a
22 traffic violation.

23 As far as the -- the No. 2, the traffic
24 stop, like I said, the police were a block east. But
25 they did -- but she did testify that they had to go

1 fast in order to catch up to the defendant and see the
2 actual traffic violation. And that you heard her
3 testify that whenever she pulled up behind the
4 defendant, the car stopped and the defendant
5 immediately got out. Again, you really have to
6 consider the credibility of the witnesses that
7 testified.

8 She said whenever they pulled up in front
9 of the house, the defendant got out and started walking
10 and she ordered him to stop. Now, it wouldn't make
11 sense, based on her testimony, that he had already
12 walked all the way up the driveway and went to throw
13 the box away and then started coming back and that's
14 when she yelled stop. You've got to take -- you've got
15 to take her testimony for what she testified to. And
16 that when they pulled up, he got out of the car and
17 that's when she told him to stop.

18 At this point when she tells him to stop,
19 she testified to the fact -- and the defendant did as
20 well -- that he had a beer can in one hand, but then he
21 made a furtive movement with his hand. This now --
22 she's being the only one that's approaching the
23 defendant. She said that she was concerned for her
24 safety that he may have went for a weapon. So, at that
25 point she does what's lawfully right and detains him

1 and puts him in handcuffs. At that point, whenever she
2 puts him handcuffs, that's when she sees the pill
3 bottle of Xanax sticking out of his front pants pocket.

4 That is when plain view and Goonan V.
5 State comes into play now. Goonan states that for --
6 the plain view is an exception to the warrant. There's
7 three prongs of the plain view. One is that law
8 enforcement officials must lawfully be where they --
9 where the object can be plainly viewed. Well, she said
10 at this point he was detained for her safety and that's
11 when she saw the pill bottle sticking out of his pants
12 pocket.

13 Second, the incriminating character of
14 the object in plain view must be immediately apparent
15 to the officials. Well, she testified that it's common
16 for people that get arrested for narcotics to carry
17 narcotics in pill bottles based on her training and
18 experience. That coupled with the information that she
19 was given by Officer Walker when the defendant went
20 into the house and came back, made it apparent to her
21 that this was likely some sort of illegal contraband.

22 The third prong is that the officials
23 must have the right to access the object. Well, at
24 this point, she's -- she's rightfully detained him
25 based on her concern for officer safety on his furtive

1 movement. The Court points out that actual knowledge
2 of incriminating evidence is not required. And an
3 officer can rely on training and experience to draw
4 inferences and make deductions as of the nature of the
5 items seen. This is what she testified to. Based on
6 her training and experience, that narcotics are
7 commonly held in pill bottles.

8 As far as the difference in the facts
9 with the Goonan case, the officer pulled up. Saw
10 five-eighths of a wine bottle that was -- that had been
11 opened. At that point started to lead to arising
12 suspicion of driving while intoxicated. And then
13 finding the pill bottle inside of the vehicle after
14 detaining the -- that defendant for driving while
15 intoxicated.

16 Well, in this case you've got to take the
17 facts that we know based on the testimony of the
18 witnesses that this is a drug area that's known for
19 high crime and narcotics. It's known as a drug house
20 where a search warrant has previously been executed, as
21 you heard the testimony by both the State's witnesses
22 and Mr. Johnson, the elder Mr. Johnson. The weird
23 behavior that Officer Walker saw the defendant exhibit
24 by going into the house, coming back and getting in the
25 car and leaving, to which he relayed to Officer

1 Gemmill.

2 And finally the furtive movements made by
3 the defendant that caused concern in Officer Gemmill.

4 Based on that, there was a totality of
5 the circumstances that allowed her to use her training
6 and experience to then find the Xanax pill bottle. And
7 then once there was no prescription or valid
8 prescription or any type of name on that pill bottle,
9 then she searched further. And she had probable cause
10 at that point to search the defendant further, which
11 she did. She found the pill bottle filled with
12 cocaine. And it was a lawful search. So, the State's
13 asking for you to deny the motion.

14 THE COURT: All right. Thank you.
15 Play that video again for me. Do y'all
16 have that?

17 MS. QUINONES: Do you want us to provide
18 you with the cases or --

19 THE COURT: If you -- yeah. I'm familiar
20 with --

21 MS. QUINONES: Woods.

22 THE COURT: Carmouche or whatever it's
23 called.

24 MS. QUINONES: Carmouche.

25 THE COURT: Yeah. But if you want to

1 give them to me, I'll look at them again.

2 MS. QUINONES: I'd ask you to look at the
3 analysis in Woods in regards to what's require for
4 reasonable suspicion and probable cause.

5 MR. KRUGH: Are you ready, Your Honor?

6 THE COURT: Yes, sir.

7 (Defense Exhibit 4 published).

8 Ms. QUINONES: And if I may, with the
9 State's -- just to give the Judge -- they would be east
10 behind -- one block behind them at this point.

11 THE COURT: Can you pause it just for a
12 second?

13 Okay. All right. Let me read this real
14 quick.

15 (Brief pause).

16 THE COURT: All right. Okay. This is
17 actually a -- sort of a unique situation in that based
18 upon the testimony that I have heard from all of the
19 witnesses in this case, there, in totality, are very
20 few things that are really in controversy as to the
21 facts of the case, starting with the defendant being at
22 the initial residence.

23 The only real thing that are in --
24 controverted is whether or not in the afternoon of that
25 day, whether he had been there all day or he had pulled

1 up, went in briefly, and then came back out. And then
2 regarding where he was -- the defendant was when the
3 officer pulled up while doing the traffic stop. Was he
4 already out of the vehicle and been out of the vehicle
5 for some period of time or whether he was getting out
6 of the vehicle? Those really are the only main things
7 that are at controversy here.

8 Taking the defense's argument in pieces
9 would give merit to the defense's argument, the things
10 that they're trying to argue. But you cannot take each
11 of these as individual things, but as a totality of the
12 circumstances.

13 Even in the case -- the Woods case
14 provided by the defense, it talks about how the Court
15 recognizes that instances where a person's conduct
16 viewed in a vacuum appear purely innocent. Yet when
17 viewed in the light of the totality of the
18 circumstances, those actions can give rise to
19 reasonable suspicion.

20 If you take in the totality of all of the
21 circumstances in this case, that there was a home under
22 surveillance because of previous narcotics activity.
23 In fact, a search warrant being -- and it seems to not
24 be in controversy. A search warrant being executed at
25 that residence before and the officers' testimony that

1 they have stopped and arrested at least a few other
2 people within weeks leading up to that. This instance
3 where people being arrested for narcotics coming out of
4 that location, the defendant leaving that location and
5 getting in the passenger seat of a vehicle. That
6 vehicle failing to signal a turn. Officers performing
7 a traffic stop on that vehicle.

8 This is where one of the controversy
9 actually comes in or, I guess, the main one is whether
10 the officer saw the defendant get out of the vehicle
11 even though they had turned the lights on and/or
12 whether or not the defendant was already out of the
13 vehicle when they first saw -- or when he first the
14 officer.

15 I can see where both points of view could
16 be perceived from each person, being the officer from
17 the officer's point of view and the defendant's point
18 of view at the time. But taking into consideration
19 what the officer knew and believed at the time and the
20 fact that an officer can detain a passenger in a
21 vehicle as part of a traffic stop or at least to
22 conduct an investigation, especially with the totality
23 of the circumstances of the defendant having come from
24 a location that was under surveillance, I believe the
25 officer had enough information to approach the

1 defendant who had gotten out of the vehicle that was to
2 be involved in the traffic stop.

3 Once the officer felt that the defendant
4 made a furtive movement, that the officer could then
5 further detain and investigate. At which point they
6 observed in plain view the top of the bottle. It's the
7 Court's opinion that had they retrieved that bottle
8 containing Xanax and it had the proper prescription
9 label on it relating to this defendant, that unless
10 there was something else that arose at that point, that
11 the search would have stopped there or should have
12 stopped there. That was not the case in this case.
13 That they obtained that bottle through plain view. It
14 had Xanax in it. There was no prescription on it that
15 did not go -- there was no name on it for this
16 defendant. That gave them probable cause to search
17 further, which the drugs were or the cocaine was
18 ultimately found.

19 So, very poorly worded on my part, just
20 thinking out loud as I go through my notes, based on
21 the totality of the circumstances involved in this
22 case, I will deny the defendant's motion to suppress.

23 MR. KRUGH: Judge, the State requests you
24 to make findings of fact and conclusions of law.

25 THE COURT: I just made my findings.
 (Proceedings adjourned).

APPENDIX B

**REPORTER'S RECORD EXCERPT:
MOTION TO SUPPRESS HEARING**

REPORTER'S RECORD
 VOLUME 1 OF 1 VOLUMES
 TRIAL COURT CAUSE NO. 1454620
 COURT OF APPEALS NO. 14-16-00230-CR

THE STATE OF TEXAS * IN THE DISTRICT COURT OF
 *
 *
 VS. * HARRIS COUNTY, TEXAS
 *
 *
 KEITHRICK THOMAS * 230TH JUDICIAL DISTRICT

MOTION TO SUPPRESS HEARING

On the 23rd day of February, 2016, the
 following proceedings came on to be heard in the
 above-entitled and numbered cause before the Honorable
 Brad Hart, judge presiding, held in Houston, Harris
 County, Texas.

Proceedings reported by computerized stenotype
 machine; Reporter's Record produced by computer-aided
 transcription.

1 Q. How did you detain him?

2 A. By placing him in handcuffs.

3 Q. Did you notice anything unusual after you put
4 him in handcuffs?

5 A. Yes, sir. There was a pill bottle protruding
6 from one of his pant pockets.

7 Q. When you saw the pill bottle, what did you
8 think was inside of it?

9 A. Based on previous cases that I've made on
10 other on -- on other defendants, oftentimes people, I
11 guess, carry their narcotics within pill bottles.
12 Usually they don't have their name on them or that
13 they'll have the label removed or -- or they'll even
14 have a name on it and have something else inside that
15 pill bottle.

16 Q. What did you once you saw that pill bottle
17 sticking out?

18 A. I removed it from his pocket and saw that it
19 didn't have his name on it. And it had Xanax within
20 it.

21 Q. Exactly how much of the pill bottle was
22 sticking out in plain view?

23 A. You could see the cap and a little bit of the
24 orange.

25 Q. So, what happened after you pulled it out?

1 A. I saw that it did not have defendant's name on
2 it and it had Xanax tablets inside of it.

3 Q. What did you do once you found out these were
4 Xanax tablets?

5 A. By finding that, it led me to believe that
6 perhaps there may be more illegal narcotics on his
7 person and I continue my search to find another pill
8 bottle that did not have his name on it with crack
9 cocaine inside of it.

10 Q. And where was that pill bottle located?

11 A. In a pant pocket.

12 Q. What did you do once you pulled out that pill
13 bottle?

14 A. I -- you know, I don't really remember. But
15 usually I end up testing the narcotics to make sure
16 that it is crack cocaine and I continue my
17 investigation, call the DA and all that stuff.

18 Q. Where was the first pill bottle located?

19 A. Am I allowed to refer to my report?

20 Q. You can.

21 A. The first pill bottle was in left pant pocket.

22 Q. In the front or the back?

23 A. The front.

24 Q. And what about the second pill bottle that
25 contained the cocaine?

1 Q. And so, just to be clear, you have no evidence
2 to suggest or submit to this Court in regards to
3 Keithrick Thomas dealing drugs outside of January 15th,
4 dealing drugs or selling drugs, using drugs or anything
5 inside of that house prior --

6 A. No.

7 Q. Now -- so, you become involved with Mr. Thomas
8 when you were told to find probable cause and get a
9 traffic stop on this Chevrolet, correct?

10 A. I was not told to find probable cause. I
11 found probable cause whenever I was told the vehicle
12 was leaving the known narcotics location, yes.

13 Q. Okay. And so, it's your testimony that
14 Officer Walker did not inform you to develop probable
15 cause to stop this vehicle?

16 A. No. They don't tell us to develop probable
17 cause. That's our job to do that. I don't initiate a
18 traffic stop unless there's probable cause to stop the
19 vehicle. So, they tell us the direction of travel.

20 Now, if vehicle made it to whatever house
21 they were going to and used their turn signal, I would
22 have never initiated the traffic stop.

23 Q. Okay. And so, then it was your job, then as
24 you stated, to try to find probable cause to pull this
25 vehicle over?

1 catch up with that vehicle, correct?

2 A. Yes.

3 Q. And by the time that you caught up with the
4 vehicle, Mr. Thomas had already exited the vehicle and
5 was walking up the driveway?

6 A. We initiated a traffic stop and he got out of
7 the vehicle as we were initiating the traffic stop. We
8 pulled up. Initiated our traffic lights and he got
9 out --

10 Q. So, is --

11 A. -- and started walking.

12 Q. Is your testimony that you had your sirens on,
13 you had your lights on and Mr. Thomas exited the
14 vehicle anyway and walked up the driveway?

15 A. Oftentimes we don't use our sirens unless the
16 car continues to go. So, yeah. We hit our lights.
17 Our lights were on when we came up behind the vehicle.

18 Q. And it's your testimony -- because I need you
19 to kind of listen to my question.

20 A. Yeah. Well, there's a lot in the question
21 that there's a lot of answers.

22 Q. Okay. So, if you don't understand, let me
23 know.

24 A. Yeah. I just did.

25 Q. Okay. No, you didn't.

1 sirens to pull him over?

2 A. Okay. The -- I don't remember if our siren
3 was on, but our lights -- initiated the traffic stop,
4 yes. And the -- what was the rest of the question?

5 Q. That was the only question.

6 So, your testimony is that yes, your
7 lights were on at the time that he got out of the
8 vehicle?

9 A. Yes, I believe so.

10 Q. Okay. But you're not sure?

11 A. I'd have to -- I don't know. Like, I'm not
12 the one that hits the button. The driver is. But yes,
13 to initiate a traffic stop, we either do that or
14 there's -- yeah. Yes.

15 Q. Okay. And so -- because I'm unclear with the
16 way you just answered. Are you certain that your
17 lights were on at the time he got out of the vehicle?

18 A. I'm not certain. My focus -- my attention was
19 on Mr. Thomas who was exiting the vehicle and I gave
20 him orders to stop.

21 Q. Okay. Now, when you gave him -- and pulled up
22 to him and gave him orders to stop, he was already
23 walking, correct, on the driveway?

24 A. We has to be, yes, ma'am, for the -- on the
25 stop.

1 Q. And had you performed a Terry frisk, you would
2 have been able to determine that there no were weapons
3 on his person, wouldn't you?

4 MR. KRUGH: Objection, calls for
5 speculation.

6 THE COURT: Sustained.

7 Q. (BY MS. QUINONES) Did you find any weapons on
8 Mr. Thomas that day?

9 A. No, ma'am.

10 Q. And so, then if you were to frisk him, you
11 would not have found weapons on him that day, correct?

12 MR. KRUGH: Objection, asked and answered
13 and calls for speculation.

14 THE COURT: Sustained.

15 Q. (BY MS. QUINONES) And so, instead of frisking
16 him, you immediately handcuffed him; is that correct?

17 A. Yes, ma'am.

18 Q. And it is your testimony that after you
19 handcuffed him, that you then saw the top of a pill
20 bottle.

21 A. Yes, ma'am.

22 Q. Now, can you tell this Court what a Terry
23 frisk is and the purpose of it?

24 A. Yes, ma'am. Terry frisk is whenever you feel
25 -- whenever you -- I don't know like the verbatim on

1 the words. But a Terry frisk is when you pat down the
2 outside of a person's clothing to make sure that they
3 don't have a weapon or anything like that when you feel
4 that maybe your safety is in danger.

5 Q. And you didn't do that, did you?

6 A. Not until after I handcuffed him.

7 Q. Okay. And you stated that -- now, prior to
8 you handcuffing him, he had not committed any crimes,
9 had he?

10 A. No, ma'am.

11 Q. There was no probable cause in order for you
12 to detain him at that time point for him committing any
13 crimes, were there?

14 A. I don't know how to answer that. Whenever I
15 make -- stop a vehicle, all people in the vehicle are
16 detained. That's why I told him to stop.

17 Q. But you -- normally when you make traffic
18 stops, you handcuff everyone in the vehicle?

19 A. If they make furtive movements, I do.

20 Q. Okay. But you did not -- well, let me ask
21 this: When you handcuffed him -- at the time that you
22 handcuffed him, he had not committed any crimes did he?

23 A. No, ma'am.

24 Q. And there are no facts that would lead you to
25 believe that there was probable cause at that point

1 that he committed any crimes, were there?

2 A. No, ma'am.

3 Q. And so, after you handcuffed him or while
4 you're handcuffing him, you see the top of a pill
5 bottle.

6 A. Yes, ma'am.

7 Q. And that's it?

8 A. Yes, ma'am.

9 Q. And it is based on the top of this pill bottle
10 that you felt you had the right to search his person?

11 A. Yes, ma'am.

12 Q. And when after just seeing the top of that
13 pill bottle that you started searching him and that's
14 when you found the other two pill bottles.

15 A. Yeah. After I found that pill bottle and
16 observed it had the narcotics in it.

17 Q. Now, you will agree with me that just the mere
18 top of a pill bottle does not suggest that someone is
19 involved in criminal activity, correct?

20 A. It may suggest it, but it does not mean for
21 certain that they are.

22 Q. Okay. And he was not driving the vehicle,
23 correct?

24 A. Yes. Yes, that's correct.

25 Q. And so, there was no, I guess, indication that

1 he could be driving intoxicated.

2 A. No.

3 Q. Because he wasn't driving, right?

4 A. No.

5 Q. There was no one who gave you any type of
6 information that Keithrick Thomas had involved himself
7 with any hand-to-hand transaction at 4306 Trafalgar,
8 was there?

9 A. I don't think they saw a hand-to-hand
10 transaction.

11 Q. So, would that be a no?

12 A. Yes, that's a no.

13 Q. And at the time you approached and handcuffed
14 him, he was in his own driveway; isn't that true?

15 A. He was in his front yard.

16 Q. Okay. Was he not in his driveway?

17 A. I remember him being in his front yard.

18 Q. Okay. Do you remember taking a statement or
19 giving an offense report? I'm sorry.

20 A. Yeah. Yeah. I mean, I'd have to read it
21 again, but I remember it being in the front of his
22 house.

23 Q. Okay. Front of his house or driveway?

24 A. It's his -- I don't remember if his driveway
25 is front of the house or not. So, I -- if it's -- or

1 if it's to the side of the house.

2 Q. Okay.

3 MS. QUINONES: May I have a moment, Your
4 Honor?

5 THE COURT: Yes, ma'am.

6 Q. (BY MS. QUINONES) Do you need to look at your
7 offense report to --

8 A. Yes. That he began walking up the driveway.

9 Q. Okay. So, he was in his driveway, correct?

10 A. Yes, ma'am.

11 Q. His own driveway of his own home, correct?

12 A. Yeah. I was unaware that his home, but yes.

13 Q. Okay. On private property, correct?

14 A. Yes, ma'am.

15 Q. And you conducted a full search of his person
16 as a result of seeing the top of that pill bottle,
17 correct?

18 A. After finding narcotics within that pill
19 bottle in plain view, yes, after that I conducted a
20 full search of his person.

21 Q. And just so that we're clear. While you're
22 handcuffing him, you see the top of a pill bottle and
23 that's when you began the search?

24 A. I see the top of the pill bottle. I remove it
25 from his pocket.